No. 14195.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER SWAN, 2D,

Appellant,

vs.

THE FIRST CHURCH OF CHRIST, SCIENTIST, IN BOSTON, MASSACHUSETTS, etc., *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

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In response to the Appellees' Answering Brief, Appellant invites the Honorable United States Court of Appeals' attention to the following facts and law.

The District Court of Appeal Had Jurisdiction Herein.

Under Appellant's "Statement of Pleadings and Facts as to Jurisdiction," Appellant considered several matters including "(b) Jurisdiction of the District Court" (App. Op. Br. p. 4). Appellees contend that there is "no Federal jurisdiction" (Appellees' Ans. Br. p. 1). No law is cited to sustain their position, although reference is made to a collateral motion to dismiss the appeal to which a memorandum of law is annexed.

It is respectfully submitted that the Appellees do not challenge the jurisdiction of this Honorable Court, since Appellant's contentions in regard thereof (App. Op. Br. p. 7) are unanswered in Appelles' Answering Brief. The contentions of the Appellees in regard to said motion, are the same contentions made by them before the Trial Court [Tr. of Rec. pp. 36-39]. These contentions were considered by the Trial Court and overruled by it upon the affidavits filed.

The basic contention of Appellees is that they are not corporations, and therefore, not "citizens" of the Commonwealth of Massachusetts.

The case of *Puerto Rico v. Russell & Co.* (1933), 288 U. S. 476, 77 L. Ed. 903, is authority for the rule as to Federal jurisdiction, that if corporate functions and rights be given to an organization, and it be treated by the laws of its creation as a corporation, it is a juridical entity, having citizenship in the said state of its creation and invoking Federal jurisdiction, on the theory of diverse citizenship in any state wherein it is engaged in business. The United States Supreme Court in such decision, concluded at page 482:

> "These characteristics under the Codes of Puerto Rico give content to their declaration that the sociedad is a juridical person. That personality is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the sociedad has a different status for purposes of federal jurisdiction then a corporation organized under that law . . ."

The Trial Court found that Appellees were each considered a "body corporate" under the laws of the Commonwealth of Massachusetts, wherein they were created

[Tr. on App. p. 82]. Its order denying a dismissal upon such ground was predicated thereon [Tr. on App. p. 105]. This Honorable Court's attention is invited to the fact that certain of the Appellees acknowledged such corporate status and qualified themselves as corporations to do business in the State of California. This was considered by the Trial Court as an admission by such Appellees "of their status as corporate entities of the State of Massachusetts" [Tr. of Rec. p. 82]. In the Commonwealth of Massachusetts, the recognition of the corporate existence of the Appellees has been presented in three cases.

In *Eustace v. Dickey* (1921), 240 Mass. 55, 132 N. E. 852, the Court held "it is unnecessary to determine in this connection whether the board of directors constitute a Board of Directors or not."

In the case of *Dittmore v. Dickey* (1924), 249 Mass. 95, 144 N. E. 517, the Court held:

> "It is not necessary to decide whether the grantees in the deed of September 1, 1892, were capable, in view of all the facts, of taking and holding as a body corporate under the statute."

However in the third case, *Chase v. Dickey* (1912), 212 Mass. 555, 99 N. E. 410, involving the Appellees, the Court held at page 563 of the State Citation:

> "The conclusion seems irrestible . . . that the plaintiff as a *body corporate* under R. L. C. 378 when objection is made by the Commonwealth are restrained from taking and holding the property described in the bill by reason of Section 9." (Emphasis ours.)

The other Appellee, if its status be not governed by Chapter 68 of the Annotated Laws of Massachusetts as

the trustees of the religious society and Church, are governed by Chapter 182 of the Annotated Laws of Massachusetts, dealing with that relationship commonly designated a "Massachusetts Trust."

The determination of the Trial Court as to the juridical entities of the Appellees, pursuant to the aforesaid chapters of the Annotated Laws of Massachusetts, stands unchallenged by said Appellees. They have not appealed therefrom. The allegations of the Second Amended Complaint that they are juridical entities recognized as a body corporate under the laws of the Commonwealth of Massachusetts, stands undenied and unchallenged. Predicated upon said premise as to their recognition as a juridical entity under the laws of the Commonwealth of Massachusetts, it is respectfully submitted that the law cited by Appellant in his Opening Brief, as to the jurisdiction of the District Court, is both proper and adequate for the purposes of this appeal.

Facts From the Record.

Appellant, in his Opening Brief, has divided the allegations of his Second Amended Complaint into those, concerning the jurisdiction of the District Court, which are summarized and set forth under the "Statement of Pleadings and Facts as to Jurisdiction" (Op. Br. p. 2), and the substance of his respective claims found at the preliminary part of each of his arguments as to his respective three counts (Op. Br. pp. 10, 21 and 54). Although not contending contrary and therefore conceding that

Appellant's statement of the pleadings is accurate and correct, Appellees, in a narrative form, set forth their conclusions as to the pleadings, alleging that it is their purpose to "avoid formalistic language of the pleadings," and to state "the facts shown by the record 'in everyday' terms." It is hard to conceive of any forum wherein formalistic language is more appropriate, particularly when applied to pleadings, than in the United States Court of Appeals. The attempt to state the facts in "every day terms," possibly appropriate in discussions with non-legally trained minds, finds no function or purpose when utilized in a formal legal appeal to a court of the status of this Honorable Court. The fallacy of this type of a statement of "facts from the record" is that it ultimately consists of the conclusions of the narrator and not a résumé of the ultimate facts set forth in the pleadings. It therefore looses all meaning or purpose when attempted to be used by legally trained minds in analyzing the sufficiency of the pleadings. Its apparent purposes and ultimate function was to be the basis of the "Preliminary Observations" found under Appellees' Answering Brief as the succeeding topic.

Appellees' Preliminary Observations.

Although not a usual or ordained part of a brief, the Appellees include in their Answering Brief, their "Preliminary Observations of Relief Sought" (p. 6). This also is in narrative form, wherein they interpret in scenario fashion, Appellant's actions as an attempt to "bludgeon" their ecclesiastical bodies (p. 7), and to superimpose his

alleged ideas and judgment for those of the Appllees (p. 9).

The primary fallacies of the Appellees' narrative lie both in their premise that legalistic language, thought or presentation of issues, are inappropriate herein, and more germanely by their avoidance of technical pleadings, they have united all of Appellant's three causes of action into one narrative and thereby seek to eliminate germane and material issues, legalistically presented by technical pleadings. This illogical approach to the problem, requires that the response thereto be based more upon logic than authority and more upon reason than upon precedence. This situation was not of Appellant's creation, but one in which he finds himself by reason of the presentation of Appellees' Answering Brief. The response thereto will seek to logically indicate the separate claims presented in Appellant's Second Amended Complaint, and the different relief sought in each of the counts thereof. This distinction was recognized by the Trial Court which rendered a different form of ruling as to the first and second counts, and as to the third count of Appellant's Second Amended Complaint [Tr. of Rec. pp. 105-111]. As to the first two counts, a motion to dismiss was granted; as to the third count, a summary judgment was ordered.

ARGUMENT.

I.

That Appellant's Second Amended Complaint States Three Distinct Causes of Action.

As indicated in Appellant's Opening Brief, the first and second counts of his Second Amended Complaint are predicated upon the same factual situation (pp. 21, 24). Basically they concern the right of Appellant to have his name reinserted in the Christian Science Journal, as an approved and recognized Christian Science Practitioner. The first cause of action dealt with Appellant's status, reputation and position as a Christian Science Practitioner and a Christian Scientist, and the damages resulting therefrom. The second cause of action dealt with his loss of income by reason of his inability to pursue his professional calling as a Christian Science Practitioner (App. Op. Br. p. 21). The third cause of action concerns itself with a book written by Appellant during the period of his sabbatical leave. Although it alleges his efforts to obtain the correction, is necessary, and approval of the Appellees, which was ignored by them, it basically alleges their affirmative action in preventing book stores and vendors of literature in general, from handling Appellant's said book, upon the penalty that if they did so, they would not be allowed to handle Appellees' reading matter, which was requisite to the maintenance of their business establishments (App. Op. Br. p. 25). The two causes of action are not dependent and had Appellees, through their organization, disbursed Appellant's book,

he still would have brought his first and second causes of action if they had failed to reinsert his name in their professional listing, and had they done this promply, he still would have brought his third cause of action if they pursued their course of conduct to hinder and delay the sale of his book by their course of intimidation.

The alleged ecclesiastical approach of the problem, wherein certain of the elements of each of the causes of action are attempted to be co-related and joined, and the conclusion drawn therefrom that the acceptance of Appellant's book and the reinsertion of his name in the professional listing, were co-dependent and co-related, is illogical, unrealistic and unfounded. Appellant finds himself in the same position as the Trial Court, who, seeking to fathom the situation herein in the light of the responses of the Appellees, concluded, "we question the sufficiency of this reply in a legal sense" [Tr. of Rec. p. 84].

II.

Appellant Stated a Claim for Relief in Both the First and Second Counts of the Second Amended Complaint.

The basic wrong complained of by Appellant in his first and second counts of the Second Amended Complaint was predicated upon the following premise:

(1) That Appellant had educationally and spiritually prepared himself for the professional calling of a Christian Science Practitioner;

(2) That he had been accepted, approved and recognized by the continued reinsertion of his name in the professional listing thereof, found in the Christian Science Journal;

(3) That he had voluntarily removed his name in accordance with usage and custom for a sabbatical period, and had, at the conclusion thereof, requested the reinsertion of his name and tendered the required fees therefor;

(4) That although it was a long established custom and practice of the Appellees, under such circumstances to reinsert such name, they failed to do so without any just cause or provocation;

(5) That although a disciplinary procedure existed under Church By-laws, if it was in any manner contended that Appellant's conduct was reprehensible, such procedure had not been applied, and Appellant had not been deprived of his rights as a Christian Science Practitioner by any Church recognized procedure.

The basic contentions of the Appellees in this regard are stated in their Answering Brief, as follows:

> ". . . Failure to reinsert such listing is asserted to be a deprivation, *not* of the *right* to practice, but simply of *approval* of his *status* as a Christian Science Practitioner; . . .
>
> Whether any man is at any given time to be officially listed as qualified to practice and teach Christian Science, or any other religious faith, is an internal ecclesiastical matter. No civil court is equipped to review or make such determination for any religious body. . . ." (Pp. 10, 11.)

Continuing, the Appellees restate their contention in their Answering Brief:

> "Although appellant would characterize a practitioner's calling as a mere 'property right,' instead of a ministry of healing through prayer (a view, the very statement of which is shocking), the determina-

> tion of whether appellees shall (by acepting his listing in the Journal) impliedly approve his educational, spiritual and moral qualifications to publicly practice Christian Science healing is, we repeat, solely a matter within the religious body. Appellant would have this Court sit on a question of spiritual fitness to be a practitioner; he asks that appellees be required to give their implied endorsement consequent on advertising appellant in the Journal . . ." (P. 12.)

This clearly indicates the variance in the contentions of the Appellant and the Appellees. Summarized, they are: Appellant states *"I having been approved educationally, spiritually and morally to practice the professional calling of a Christian Science Practitioner and not having been deprived of such right by the procedure provided in the Manual* (By-laws), *cannot be deprived of such right by a non-adherence to a long established practice of reinserting my name in the Journal after a voluntary withdrawal."* The Appellees contend that without adherence to Church procedure, and without the bringing of any charges or affording Appellant an opportunity to be heard and make a defense, they may re-evaluate his educations, spiritual and moral qualifications to publicly practice as a Christian Science Practitioner, and deprive him of such right by withholding the publication of his name in the Christian Science Journal. Upon the correctness of either contention, lies the solution of the query, does Appellant's first and second counts of the Second Amended Complaint, state a claim for relief?

Although ignored by the Appellees, the publication of a practitioner's name in the Journal constitutes more than an advertisement. As alleged in the said Second Amended Complaint, only Christian Science Practitioners who are

listed in the Christian Science Journal enjoy the following rights and privileges:

(1) Recognition to act before various administrators, bureaus or officials of the Federal, State or Municipal Governments;

(2) Recognition and acceptance as expert witnesses by Federal, State or Municipal courts;

(3) Protection by law from divulging information received in a professional capacity;

(4) Acceptance as an expert and recognition of professional standing by public institutions, schools, hospitals or welfare institutions;

(5) Acceptance by the branch Christian Science Churches for the performance of functions or the making of certificates usually done or required to be done by a Christian Science Practitioner [Tr. on App. p. 23].

(6) Obtain the services of a Christian Science nurse for his patients;

(7) Ability to place or attend his patients in Christian Science institutions;

(8) Share an office or practice with an approved Christian Science Practitioner, who was listed in such Journal [Tr. on Appeal p. 24].

The contention of Appellees that California cases are inapplicable to the within situation, is met by an examination of the facts and law of such cases and their application in principle of the situation herein. If it be considered that Appellant is following a profession, the cases as to the right to continue to follow such profession in the absence of disbarment or disfranchisement by legal means, is well established (App. Op. Br. p. 14). If it be held that the same is "a ministry of healing through prayer"

(Appellees' Ans. Br. p. 12), then the rule established by *Providence Baptist Church v. Superior Court* (1952), 40 Cal. 2d 55, 251 P. 2d 10, cited at length in Appellant's Opening Brief (p. 16), is directly applicable, since it involves the determination of the status of Appellant, and whether he is entitled to receive the rights, privileges and emoluments of the office for which he has been qualified. This, Supreme Court of California held, "presents a problem involving civil and property rights." More germane is the further holding of said Supreme Court, found at page 64 of the California Citation that civil courts may determine whether, in disfranchisement of a minister or other church dignitary, the rules of the Church have been followed, and *"if they have not, what will be the resulting effect on civil and property rights?"* (Emphasis ours.)

It is respectfully submitted that the Appellees concede that intentionally and deliberately, they disfranchised Appellant by excluding his name through the process of failing to comply with their long established policy to reinsert and republish in the Christian Science Journal, upon request, the name of a Christian Science Practitioner, voluntarily withdrawn therefrom, and that such disfranchisement was done without resorting to the procedure provided therefore by the Church Manual (By-Laws).

It is further respectfully submitted that so doing, they have deprived Appellant of certain rights and privileges, requisite to the resumption of his practice as a Christian Science Practitioner. In conclusion, it is respectfully submitted that his right to follow this professional calling, either as a property right, or if considered in the light of the emoluments of the office, constitutes a civil wrong and a claim recognizable under the law of the State of California.

III.

That a Summary Judgment Was Improperly Granted as to the Third Count of the Second Amended Complaint.

The latter half of Appellees' Answering Brief is devoted to the argument that the summary judgment was proper as to Appellant's third count of his Second Amended Complaint (pp. 16-33). Although basically the summary judgment concerns itself with the facts, since it is a judgment upon the merits, the argument of the Appellees deals principally with the pleading of such count. The argument of the Appellees is allegedly predicated upon the Church Manual, Appellees stating that "appellant himself pleaded this Manual to be the official By-Laws" (Appellees' Ans. Br. p. 16).

An examination of the pleading of Appellant indicates the limited purpose for which the Manual was plead, namely, to allege the existence of a disciplinary or expulsion procedure for those who misteach Christian Science [Tr. of Rec. pp. 15-16]. As alleged in said paragraph, Exhibit "A" annexed to said Second Amended Complaint, further so indicates and is limited to such procedure [Tr. on Appeal pp. 34-36].

It is basically the contention of Appellees that Appellant's book, "God on Main Street", is an "obnoxious" book and "an adulteration of Christian Science doctrine and teachings." Although such statements are prefaced or followed by the statement that the determination of such fact is immaterial to the issues (Appellees' Ans. Br. p. 19), logic would indicate that if the answer be in the negative, no complaint would be made by the Appellees and no punitive action would have been taken, as factually it was. The complained-of actions on the part of the

Appellees do not concern themselves only with the vending sources of literature under their control, but primarily with independent vendors of literature, who, as part of their vending commodities, disburse the literature of the Appellees. Appellees' intimidation of such independent vendors, requiring them to exclude Appellant's book, or to be deprived of Appellees' literature, is the gravamen of Appellant's third cause of action [Tr. of Rec. pp. 30-31]. The allegations as to the reading rooms and Church publications are indicative of the intent and purpose of the Appellees.

The allegations of the Second Amended Complaint as to the presentation of Appellant's book to Appellees, prior to its publication, is unjustifiably concluded by Appellees to be a promotional procedure in the dispensing of Appellant's book. Actually the same was a recognized and ordained practice, to prevent any objection after printing by correction of the same prior to printing, and to see that the same was in conformity with the exercise of the functions of the committee on publication of the Appellees. Section 2, Article XXXIII of the Manual (p. 97) defining the duties of the Committee on Publications, provides as follows:

> "It shall be the duty of the Committee on Publication to correct in a Christian manner impositions on the public in regard to Christian Science, injustices done Mrs. Eddy or members of this church by the daily press, by periodicals or circulated literature of any sort. This Committee on Publication shall be responsible for correcting or having corrected a false newspaper article which has not been replied to by other Scientist, or which has been forwarded to this Committee for the purpose of having him reply to it. If the correction by the Committee on

> Publication is not promptly published by the periodical in which it is desirable that this correction shall appear, this Committee shall immediately apply for aid to the Committee on Business. Furthermore, the Committee on Publication shall read the *last proof sheet* of such an article and see that it is published according to copy; he shall circulate in large quantities the papers containing such an article, sending a copy to the Clerk of the Church. It shall also be the duty of the Committee on Publication to have published each year in a leading Boston newspaper the letter sent to the Pastor Emeritus by the Church members in annual meeting assembled. The State Committees on Publication act under the direction of this Committee on Publication."

The court's attention is invited to the use of the term "proof sheet", indicating the remedial desires of the scrivner and adoptors of this By-Law. Appellant was thus pursuing usual and ordained Church procedure in presenting his "copy and proofs" to the Appellees. The failure to comply therewith or to adhere to the Church Manual is attributable only to Appellees. Their now disclosed disapproval of his book, was not indicated to him for correction as required by the By-Law, but they sought, by unauthorized means, to handicap the same, by failure to act. He thereupon published his book and sought to disburse the same through independent vendors as well as Church vendors. Appellees of necessity, must concede his right as to independent vendors, but seek to prevent such sale when the same is sold in a store wherein their literature is disbursed, even if the same be an independent vendor. They allege their position in their Answering Brief (p. 23), as follows:

> "We fully agree that appellant is free to write and sell *his concept* of Christian Science doctrine and

> teachings in the 'open market of ideas,' but appellees are free to disassociate their religious literature from appellant's literature. Appellees are not obliged to *aid* him or *assist* him by permitting *association* of their literature with his."

"Without correction" as required by their By-Laws, and alleging that the "obnoxious" character of Appellant's book is not an issue and its existence or non-existence is immaterial (Appellees' Ans. Br. p. 19), Appellees justify their action as to the independant vendors on the theory that Appellant's book is factually, but undeclaredly an "obnoxious" book (Appellees' Ans. Br. p. 24). Had Appellees complied with the Manual, any alleged obnoxious portions or parts of said book, would have been corrected. The failure of correction was the result of the failure of Appellees to do so upon the request of Appellant.

The gravamen of Appellant's third cause of action is thus admitted by the Appellees. It is apparent that they found objection in Appellant's book and sought to hinder, delay or prevent its public sale on the "open market . . ." by contending that the same could not be sold "in *association*" with their literature, which, in its practical operation consisted of their mandate to independent vendors, not to sell Appellant's book, or be deprived of Appellees' literature.

All of the cases cited by Appellant deal with the pleading of the third cause of action, asserting that certain allegations are insufficiently alleged. Had the holding of the Trial Court been similar in regard to the third cause of action, as it had the first and second causes of action of the Second Amended Complaint, such law would have been proper and germane. The technical complaints as to pleading of the Appellees is not in conformity with

the theory of liberalized pleading, now pursued by our Federal Courts.

It is, however, the contention of Appellant, that by reason of the granting of a Summary Judgment as to the third cause of action, pleadings are germane only to the facts alleged by them, and not as to the technicalities of their allegations (See App. Op. Br. p. 38).

It is respectfully submitted that the aforesaid actions on the part of the Appellees, particularly in regard to independent vendors of literature, constitute illegal restraint of trade and is a violation of Title 15 of the United States Code Annotated, the pertinent sections of which and law applicable are set forth in Appellant's Opening Brief (p. 31).

It is further respectfully submitted that the affidavits filed herein can only be utilized for the purpose of ascertaining the issues of fact presented, but not to decide the facts (App. Op. Br. p. 29), and that upon the issues herein presented, as alleged in the Second Amended Complaint, and the concessions of the Appellees as to their actions and theories set forth in their Answering Brief, there has been an illegal restraint of trade, for which Appellant is entitled to redress. For the foregoing reasons, it is further respectfully submitted that the Summary Judgment in favor of the Appellees was improperly granted.

Conclusions.

It is respectfully submitted by Appellant, as follows:

1. That the Appellees and each of them are recognized and accepted as juridical entities under the laws of the Commonwealth of Massachusetts, the state of their creation;

2. That the Appellees have accepted respectively, the status of a "body corporate" under the laws of said Commonwealth and that two of the Appellees have qualified as corporations under the laws of the State of California;

3. That the holdings, findings and conclusions of the District Court that Appellees are juridical entities recognized as corporations of said Commonwealth, have not been challenged or appealed from;

4. That a juridical entity given and granted the function and rights of a corporation by the laws of the state of its origin, is a "citizen" for the purpose of diversity of citizenship to invoke Federal jurisdiction;

5. That the law cited in Appellant's Opening Brief as to the jurisdiction of the District Court, is pertinent and controlling;

6. That the Motion to Dismiss of the Appellees should be denied;

In addition thereto, Appellant respectfully submits:

7. That under the laws of the State of California, being the forum in which the controversy arose, the attempted disfranchisement of appellant as a recognized, approved and accepted Christian Science Practitioner by Appellees, who refused to reinsert and republish his name in accordance with established customs, without the bringing of any charges or following the procedures for disfranchisement, provided for in the Church By-Laws, constitutes a civil wrong, recognizable by the courts of California and the Federal courts sitting within said state;

8. That the failure to republish and reinsert Appellant's name in the Christian Science Journal, as an ap-

proved, recognized and accepted Christian Science Practitioner, prevented him from pursuing such functions and receiving certain recognitions by Federal, State and Municipal Courts officers and officials and by institutions, recognized practitioners and nurses of the Christian Science faith, which resulted in the loss of the emoluments, benefits and income from the practice as a Christian Science Practitioner, and also constitutes a property right, recognizable by the laws and court of California and the aforesaid Federal Courts;

9. That by reason of such non-republishing and the damages resulting therefrom as alleged in the first and second counts of the Second Amended Complaint, such counts, state respective claims upon which relief can be granted;

10. That the *Dismissal with Prejudice* by the Trial Court of said Counts one and two of said Second Amended Complaint, is improper and prejudicial;

11. That the Appellees, without directly declaring Appellant's book to be "obnoxious" to their creed, and by deliberately failing to correct the same in accordance with procedure set forth in their By-Laws, cannot act in a manner and under the premise that the same is obnoxious;

12. That the Appellees cannot legally prevent independent book sellers and stores from handling and disbursing Appellant's book upon the theory that the same is in "association" with their literature and threatening to withhold their literature from any independent vendor or bookstore handling Appellant's said book;

13. That said conduct on the part of Appellees constitutes a restraint of trade prohibited by law;

14. That the Summary Judgment granted by the Trial Court as to third cause of action of said Second Amended Complaint, is predicated not upon pleading, but upon facts, and that under the facts as established herein, and particularly as alleged in the complaint, Appellant is entitled to relief;

15. That the Summary Judgment granted by the Trial Court as to the third cause of action of said Second Amended Complaint is erroneous and improper.

In conclusion, Appellant respectfully submits that the Dismissal and Summary Judgment of the District Court should both be reversed.

Respectfully submitted,

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